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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. .....

HOMER TRIMBLE,

Petitioner

vs.

TEXAS STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS,

Respondent

PETITION FOR WRIT OF CERTIORARI

To The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, Texas

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Homer Trimble here prays that a Writ of Certiorari be issued to review the final decree of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, sitting at El Paso, Texas, reversing the judgment of the District Court of Winkler County, Texas, the Trial Court, which was in favor of Petitioner.

I.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION IN THE CASE IN THE COURT OF CIVIL APPEALS

The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, Texas, reversed a judgment in favor of Petitioner in the Trial Court. This case is officially reported and styled as Texas State Board of Registration for Professional Engineers, Appellant, vs. Homer Trimble, Appellee, 388 SW 2d 331. Unofficially the opinion of the Court of Civil Appeals is appended to this petition and begains at page 48 of the Appendix. The Supreme Court of Texas refused an application for writ of error, N.R.E., (no reversible error), on January 13, 1965, a certified copy of which disposition is appended hereto at page 43 of the Appendix. A Motion for Rehearing of Application for Writ of Error was overruled by the Supreme Court of Texas on February 17, 1965, a certified copy of which disposition and opinion appears at page 45 of the Appendix and is officially reported and styled as Homer Trimble, Petitioner vs. Texas State Board of Registration for Professional Engineers, Respondent, 387 SW 2d 876.

The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas, is thus the highest Court of this State in which a decision can be had within the meaning of 28 U. S. C. A., Section 1257.

II.

STATEMENT AS TO JURISDICTION

Jurisdiction to grant this petition is sustained by Title 28, U. S. C. A., Section 1257, Subsections (3) and Title 28, U. S. C. A., Section 2101 Subsection (c).

Jurisdiction of this Honorable Court is invoked by virtue of the 14th Amendment to the Constitution of the United States guaranteeing a litigant due process of law and equal protection of the laws as a citizen of the United States and the State of Texas, Petitioner

having been denied the same by the decree of the Court of Civil Appeals at El Paso, Texas, of June 10, 1964, followed by a denial of Petitioner's motion for rehearing on July 29, 1964 and by denial of Petitioner's second motion for rehearing on August 26, 1964, and a subsequent refusal by the Supreme Court of the State of Texas, to grant an Application for Writ of Error on January 13, 1965, and again on motion for rehearing on February 17, 1965, same being a judgment of the court of last resort in the State of Texas. The said decree of the Court of Civil Appeals at El Paso, Texas, and the order of the Supreme Court of the State of Texas denying Petitioner's Application for Writ of Error, together with the opinion rendered thereon, is a final judgment. The said decree of the Court of Civil Appeals at El Paso, Texas, and the order of the Supreme Court of the State of Texas denying Petitioner's Application for Writ of Error, together with the opinion rendered thereon, is a final judgment, within the purview of Title 28, U. S. C. A., Section 1257, holding and determining that the Texas State Board of Registration for Professional Engineers did not deny Petitioner due process of law in making and entering its order revoking Petitioner's professional engineers license on November 7, 1961.

III.

QUESTIONS PRESENTED

1.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in refusing to hold Article 3271a, Section 22(b), R. C. S. of Texas, unconstitutional and invalid because said statute attempts to deligate a "judicial" or "quasi-judicial" function to an administrative agency without providing full judicial review thereof in the nature of a "trial de novo".

2.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in refusing to hold Article 3271a, Section 22(b), V. C. S. of Texas, unconstitutional an invalid because there is no provision under such statute whereby the orders of revocation of license by Respondent Board are to be held in abeyance or superseaded pending judicial review of same.

3.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in refusing to follow and apply the unequivocal holdings and opinions of the Supreme Court of the State of Texas in KEY WESTERN LIFE INSURANCE CO. v. STATE BOARD OF INSURANCE, 350 SW 2d 839, and SCOTT v. BOARD OF MEDICAL EXAMINERS, 384 SW 2d 686, and the holding and opinion of the Court of Civil Appeals, Fourth Judicial District of Texas, at San Antonio, in FRANCISCO v. BOARD OF DENTAL EXAMINERS, 149 SW 2d 619, which said holding and opinion was approved by the Supreme Court of Texas by the latter's denial of a Writ of Error, all of which holdings and opinions are governing in the case at Bar, and Petitioner was, and is, entitled to be protected by laws of the State of Texas ennunciated therein.

4.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in refusing to find that the Order of Respondent Board was void for the reason that Respondent Board attempted to enter the Order revoking Petitioner's professional engineering licese without acquiring proper jurisdiction.

5.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in

in refusing to find that the Order of Respondent Board was void for the reason that Petitioner was never formally charged by Respondent Board, pursuant to statutory requirement, of the alleged professional misconduct; consequently, the jurisdiction of Respondent Board was never invoked.

6.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in in refusing to find that the Order of Respondent Board was void for the reason that Respondent Board did not afford Petitioner due process of law in making and entering the Order revoking Petitioner's professional engineering license.

7.

Did Respondent Board deny Petitioner due process of law and/or equal protection of the laws in failing to give Petitioner "notice" of the charges alleged against him and the hearing thereon as required by his constitutional guarantee to due process.

8.

Did Respondent Board deny Petitioner due process of law and/or equal protection of the laws in failing to give Petitioner "notice" of the charges alleged against him and the hearing thereon as required by statute.

9.

Did Respondent Board deny Petitioner due process of law and/or equal protection of the laws by making and entering its Order revoking Petitioner's professional engineering license at a hearing without giving Petitioner statutory "notice" of the time, place and purpose of said hearing prior thereto.

10.

Did Respondent Board deny Petitioner due process of law and/or equal protection of the laws by making and entering its Order revoking Petitioner's professional engineering license at a hearing without

giving Petitioner "notice" of the time, place and purpose of said hearing prior thereto as required by Petitioner's constitutional guarantee to due process.

11.

Did Respondent Board deny Petitioner due process of law and/or equal protection of the laws by making and entering its Order revoking Petitioner's professional engineering license without affording Petitioner a "full and open hearing".

12.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in refusing to find that the Order of Respondent Board was void for the reason that Respondent Board acted in an arbitrary, unreasonable and capricious manner in making and entering its Order.

13.

Did the Court of Civil Appeals deny Petitioner due process of law and/or equal protection of the laws in refusing to find that the Order of Respondent Board was void for the reason that Respondent Board abused its discretion in making and entering its Order.

IV.

STATEMENT OF THE CASE AND FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner is a duly licensed professional engineer, registered with the Texas State Board of Registration for Professional Engineers under License No. 1446. Respondent, Texas State Board of Registration for Professional Engineers, is an administrative agency of the State of Texas, created, existing and empowered by Title52A, Article 3271a, R. C. S. of Texas. The instant case emanates from an order made and en-

tered by Respondent Board on November 7, 1961 whereby it attempted to revoke and cancel Petitioner's license to practice Professional Engineering within the State of Texas.

The power of Respondent Board to revoke the registration of any registered engineer, such as Petitioner, is defined by Article 3271a, Section 22 which provides as follows:

"Sec. 22. The Board shall have the power to revoke the certificate of registration of any registrant who is found guilty of:

(a) The practice of any fraud or deceit in obtaining a certificate of registration;

(b) Any gross negligence, incompetency, or misconduct in the practice of professional engineering as a registered professional engineer.

In determining any such charges the Board shall proceed upon sworn information furnished it by any reliable resident of this State; such information shall be in writing and shall be duly verified by the person familiar with the facts therein charged, and three (3) copies of the same shall be filed with the Secretary of the Board. Upon receipt of such information the Board, if it deems the information sufficient to support further action on its part, shall make an order setting the charges therein contained for hearing at a specified time and place, and the Secretary of the Board shall cause a copy of the Board's order and of the information to be served upon the accused at least thirty (30) days before the date appointed in the order for the hearing. The accused may appear in person or by counsel, or both, at the time and place named in the order and make his defense to the same. If the accused fails or refuses to appear, the Board may proceed to hear and determine the charges in his absence. If the accused pleads guilty, or upon a hearing of the charges the Board and a majority of its

members shall find them to be true, it may enter an order revoking the certificate of registration of such registered professional engineer. The Board shall have the power, through its Chairman or Secretary, to administer oaths and compel the attendance of witnesses before it as in civil cases in the district court by subpoena issued over the signature of the Secretary and seal of the Board. If the accused desires the evidence to be preserved and shall so inform the Board before the hearing is begun and shall deposit with the Board such a sum of money as the Board may deem reasonably necessary for the employment of a stenographer, then the Board shall employ such stenographer and when so employed he shall be the official stenographer of the Board for the purpose of reporting the evidence and proceedings of such Board. In proceedings under this section, as under others, a majority of the Board shall constitute a quorum.

When the Board has completed such hearing it shall make a record of its findings and order andshall cause a certified copy thereof to be forwarded to the accused.

Any person who may feel himself aggrieved by reason of the revocation of his certificate of registration by the Board, as hereinabove authorized, shall have the right to file suit within thirty (30) days after receiving notice of the Board's order revoking his certificate of registration, in the district court of the county of his residence, or of the county in which the alleged offense relied upon as grounds for revocation took place, to annul or vacate the order of the Board revoking the certificate of registration. Said suit shall be filed against the Board as defendant, and service of process may be had upon its Chairman or Secretary. The suit shall be tried as other civil causes, the burden of proof developing upon the plaintiff assailing the order of revocation.

The Board, for reasons it may deem sufficient, may re-issue a certificate of registration to any person whose certificate has been revoked, provided four (4) or more members of the Board vote in favor of such re-issuance. A new certificate of registration, to replace any certificate revoked, lost, destroyed, or mutilated, may be issued, subject to the rules of the Board, and a charge of Three ($3.00) Dollars shall be made for such issuance".

Section 23, Article 3271a, R. C. S. of Texas, provides in part that any person who shall practice, or offer to practice the profession of engineering in the State of Texas without being registered or exempted therefrom shall be fined not less than One Hundred Dollars nor more than Five Hundred Dollars, or be confined in jail for a period not exceeding three months, or both.

Prior to the entry of the order revoking Petitioner's professional engineers license Respondent Board did not make an order setting any charge against him. Respondent Board did not make an order specifying a time and place for hearing charges against Petitioner, as alleged in the required order of the Board charging him therewith. The Secretary of Respondent Board did not cause a copy of an order specifying the charges against Petitioner, and specifying the time and place of hearing thereon, to be served upon Petitioner at least thirty days before the date appointed for such hearing.

Notwithstanding such failure, Respondent Board proceeded to conduct some type of meeting at which Petitioner was not present, but at which his two attorneys appeared to protest the illegality of such meeting. Petitioner's attorneys were required to leave such meeting while the members of Respondent Board entertained and considered certain evidence the nature of which was unknown to Petitioner and

his attorneys at such time. Said Board considered said secret evidence in the enforced absence of Petitioner and his attorneys. The members of Respondent Board based said order upon such secret evidence. Respondent Board did not allow Petitioner nor his attorneys an opportunity to offer evidence, refute or explain such secret evidence. Respondent Board refused to deliver to Petitioner's attorneys a copy or a transcript of the secret evidence and to grant a delay to permit such attorneys an opportunity to refute or explain same.

Upon appeal to the District Court of Winkler County, Texas, Petitioner attacked the validity of the action of Respondent Board on the grounds that he was not afforded due process of law and that Article 3271a, Section 22, R. C. S. of Texas, was unconstitutional. No contention has ever been made by Petitioner, nor has there ever been a dispute that the order of Respondent Board was not supported by substantial evidence. In view of such attack the Trial Court ruled that the burden was upon Petitioner to establish by a preponderance of the evidence the existence of the facts claimed by Petitioner to constitute such denial of such due process. In accordance with such ruling by the Trial Court, Petitioner presented evidence of each and all of the above enumerated facts and obtained jury findings as follows:

a. Respondent Board failed to make an order setting out the charges upon which Petitioner's professional engineering license was revoked and specifying a time and place thereon;

b. Respondent Board failed to cause a copy of its order setting the charges upon which Petitioner's professional engineering license was revoked to be served upon Petitioner at least thirty days before the date appointed in said order for hearing;

c. Respondent Board failed to give Petitioner a full and open hearing on the charges upon which the revocation of his professional engineering license was based;

d. The order revoking Petitioner's professional engineering license made and entered by Respondent Board on November 7, 1961 was arbitrary, unreasonable and capricious; and

e. The order revoking Petitioner's professional engineering license was an abuse of discretion by Respondent Board.

The submission of such questions to the jury were not challenged by Respondent Board on the grounds that same were not supported by the evidence.

The Trial Court received the verdict from the jury and entered judgement declared the order of Respondent Board rendered and entered on the 7th day of and entered judgment thereon in accordance with said verdict. Such judgment declared the order of Respopndent Boord rendered and entered on the 7th day of November, 1961, revoking the professional engineering license, Serial No. 1446, theretofore issued to Petitioner, to be vacated, annulled, held for naught and declared to be null and void.

The judgement of the Trial Court was appealed by Respondent Board to the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, at El Paso, Texas, and said Court of Civil Appeals reversed the judgment of the Trial Court. The Court of Civil Appeals completely ignored the findings of the jury and the questions of due process of law and constitutionality of the statute in question, which were the only questions before the Trial Court and the jury. Although Petitioner filed two detailed motions for rehearing, wherein it was directed to the attention of the Court of Civil Appeals that the due process of law

question and the constitutionality of Article 3271a, Section 22, R. C. S. of Texas, were the only questions involved, said Court of Civil Appeals continued to ignore same.

Petitioner filed his Application for Writ of Error with the Supreme Court of the State of Texas again urging and directing the attention of the Court to his claim of denial of due process of law by Respondent Board and the unconstitutionality of Article 3271a, Section 22, R. C. S. of Texas. The Supreme Court of the State of Texas overruled Petitioner's Application for Writ of Error without written opinion. Whereupon, Petitioner filed a Motion for Rehearing with the Supreme Court of the State of Texas pointing out the conflict of the Court's action in refusing to grant such Writ of Error with the recognized opinions of said Court in previous cases and with the constitutional guarantee of Petitioner to due process of law. The Supreme Court of Texas overruled Petitioner's Motion for Rehearing in an almost unprecedented manner by writing a Per Curiam Opinion stating their reasons for so doing. The record before the Supreme Court reflected the fact findings of the jury, which findings had not been objected to in the Trial Court as lacking support in evidence. Under the unanimous authorities of the State of Texas such findings of fact were not properly reviewable by the Supreme Court of Texas. Notwithstanding such authorities to the contrary the Court made findings of fact contrary to those made by the jury in order to justify the overruling of Petitioner's Motion for Rehearing.

V.

MANNER IN WHICH THE FEDERAL QUESTION WAS FIRST RAISED AND THE DISPOSITION OF THE SAME

Petitioner raised the question of the constitutionality of Article 3271a, Section 22, R. C. S. of Texas, and

the question of whether Petitioner had been accorded due process of law by Respondent Board in the making and entering of its Order on November 7, 1961 throughout the original petition filed herein, all Trial Court pleadings filed by Petitioner and by Petitioner's requested jury issues. When Respondent Board urged in the Court of Civil Appeals that the case was governed solely by the "substantial evidence" rule, Petitioner again urged that this case is controlled solely by the above stated issues and no contest was made to the sufficiency of the evidence. The following statement is found on page 3 of Petitioner's Brief in the Court of Civil Appeals and it tersely demonstrates the manner in which the two foregoing Federal questions have been urged throughout all proceedings relative to this cause, to-wit:

> "The issues in the instant case, as finally joined, did not orbit the question of substantial evidence to support the action of the Board, but rather dealt with whether the Board had accorded Appellee his rights in relation to the procedures followed by the Board in taking the action attacked."

Petitioner continued to urge such questions as controlling in his Motions for Rehearing in the Court of Civil Appeals, in Petitioner's Application for Writ of Error to the Supreme Court; and in Petitioner's Motion for Rehearing before the Supreme Court of the State of Texas.

The Trial Court rendered judgment in favor of Petitioner based upon such contentions. The Court of Civil Appeals completely ignored such questions and based on its judgment and opinion entirely upon the "substantial evidence" rule, which has never been assailed by Petitioner in this proceeding. The Supreme Court of the State of Texas was the first Appellate Court to consider the question of the constitutionality of Article 3271a, Section 22, R. C. S. of

Texas and the question of due process. By its failure to hold Article 3271a, Section 22, supra, unconstitutional, the Supreme Court of the State of Texas has by its final judgment overruled Petitioner's challenge to the constitutionality thereof. Further, the Supreme Court of the State of Texas in its Per Curiam Opinion on Motion for Rehearing expressly held that Petitioner had not been denied due process of law by the action of Respondent Board.

The sufficiency of the evidence to satisfy the requirements of the "substantial evidence" rule having never been questioned in the instant case and the question of due process of law having been adversely decided against Petitioner the only remaining act or duty devolving on the Trial Court upon remand of said cause is the ministerial act of entering judgment affirming the Order of Respondent Board.

VI.

AUTHORITIES FOR THE REASONS RELIED UPON FOR THE GRANTING OF THIS WRIT OF CERTIORARI

The only two general questions which have ever been involved in the case at Bar are: (1) is Article 3271a, Section 22(b), R. C. S. of Texas, unconstitutional, and (2) was Petitioner denied due process of law by Respondent Board in the making and entering of the Board's Order revoking Petitioner's professional engineering license.

Petitioner in his Original Petition filed in the Trial Court limited his attack on the Order of Respondent Board to an affirmative finding to either and/or both the above stated propositions. No attack has ever been made on the Order of Respondent Board because same is not supported by "substantial evidence". In addition to Petitioner so limiting his attack upon the Order of Respondent Board in his Original Petition, he has unequivocally directed this to the attention of both the Court of Civil and the Supreme

Court of the State of Texas in all motions and briefs filed therein. This Court's attention is directed to Page 3 of Petitioner's Brief in the Court of Civil Appeals; Page 6 of Petitioner's Motion for Rehearing in the Court of Civil Appeals; and Pages 13 and 14 in Petitioner's Application for Writ of Error in the Supreme Court of the State of Texas. At each of the cited references Petitioner has stated that the Order of Respondent Board was being attacked solely on the grounds that he was not afforded due process of law and/or the statute in question was unconstitutional.

The Court of Civil Appeals and the Supreme Court of the State of Texas, having held that Petitioner was not denied due process of law and having upheld the validity of Article 3271a, Section 22, R. C. S. of Texas, the law of the instant case has been established and the Trial Court is bound thereby. WALL, et al, v. WALL et al, 186 SW 2d 57, (Supreme Court of Texas) and STATE, et al v. MILLER, et al, 183 SW 2d 278. Consequently, the only remaining duty of the Trial Court upon the remand of this cause would be the ministerial function of entering a judgment affirming the Order of Respondent Board.

There can be no question, that as the issues herein were finally joined, the judgment and opinion of the Court of Civil Appeals and the action of the Supreme Court of the State of Texas in refusing Petitioner's Application for Writ of Error constitute a final judgment within the purview of Title 28, U.S.C.A., Section 1257, Subsection (3).

In connection with the question of whether Petitioner was denied due process of law by Respondent Board it is earnestly submitted that the Court of Civil Appeals and the Supreme Court of the State of Texas both exceeded their authority and jurisdiction in reviewing this case on appeal. The Court of Civil Appeals did so by refusing to recognize and take cognizance of the immutable findings of the jury and

affirming the judgment of the Trial Court thereon. The Supreme Court of the State of Texas did so by making unauthorized findings of fact contrary to those made by the jury in order to justify the refusal of a Writ of Error herein. The Supreme Court of the State of Texas in its Per Curiam Opinion stated as follows:

> "The Court of Civil Appeals did not discuss petitioner's complaint that he had not been afforded procedural due process of law in the proceeding leading to the revocation of his license.
> We have carefully read the Statement of Facts, and have concluded that the evidence does not raise the issue."

The foregoing excerpt from said opinion clearly demonstrates that the Supreme Court of the State of Texas read and considered the evidence and made their own findings of fact in lieu of those made by the jury.

It has been unanimously held by all of the appellate courts in the State of Texas that objections not made to the jury charge before same is read to the jury are waived and where such objections are not made and no assignment of error challenging the sufficiency of the evidence to support the jury findings both the Court of Civil Appeals and the Supreme Court of the State of Texas are without jurisdiction to consider the sufficiency of the evidence and the jury's findings must be taken as true. LEATHERWOOD v. HOLLAND, 375 SW 2d 517, writ ref. N. R. E.

The Supreme Court of the State of Texas in GIFFORD et al v. FORT WORTH AND D. C. RAILWAY COMPANY, 249 SW 2d 190 reiterated the foregoing rule as follows:

> "There was no assignment in the Court of Civil Appeals challenging the sufficiency of the evi-

dence to support the jury's findings on the issues of contributory negligence. Therefore, since we have concluded that that court erred in holding that there was no evidence to support those findings, the result is that, as to those issues, we must reverse the judgment of the Court of Civil Appeals and affirm that of the trial court. Wisdom v. Smith, 146 Tex."

The objections and exceptions of Respondent Board to the charge of the Trial Court are found on Page 33 of the Transcript of the proceedings of the Trial Court. Respondent Board made only two objections to the charge of the Court and those objections were in substance that the case was controlled by the substantial evidence rule and should not be tried before a jury and that all issues in said case were issues of law and should not be submitted to a jury. There is absolutely no objection to the Trial Court's charge that the questions submitted to the jury were not raised by the evidence or supported by the evidence.

Further the assignments of errors claimed by Respondent Board, which was the party appealing from the judgment of the Trial Court, are found on Page 2 of its Brief filed with the Court of Civil Appeals. Under the foregoing authorities the Court of Civil Appeals and the Supreme Court of the State of Texas had before them only those matters assigned by Respondent Board as error. An examination of these points of error, which are four in number, will reveal that the scope of review by the appellate courts in Texas was limited to the following points of error:

"The Trial Court erred in ordering the trial of the instant case before a jury and under the preponderance of the evidence rule."

"The Trial Court erred in failing to grant Appellant's Motion for Judgment.'"

"The Trial Court error in granting Appellee's

Motion in Limine.'"

"The Trial Court erred in not entering judgment for Appellant because the testimony before the Trial Court shows that the order of Appellant was supported by substantial evidence."

It is salient to note that there is no assignment of error that the issues submitted to the jury were not raised or supported by the evidence. Therefore, under the controlling authorities any complaint as to the sufficiency of the evidence was waived by Respondent Board and the Court of Civil Appeals and the Supreme Court of the State of Texas were without authority and jurisdiction to review same and/or to substitute their findings of fact in lieu of those of the jury.

Petitioner insists that the following have been affirmatively established by jury finding as immutable facts not subject to review by either the Court of Civil Appeals or the Supreme Court of the State of Texas, to-wit:

1. That the Respondent Board failed to make an Order setting the charges upon which the revocation of Petitioner's license was revoked and specifying time and place for hearing thereon.
2. That the Respondent Board failed to cause a copy of its order setting the charges upon which revocation was sought to be served the Petitioner 30 days before the date designated for hearing.
3. That Respondent Board failed to give Petitioner a full and open hearing on the charges upon which revocation of Petitioner's license was sought.

The only argument which Respondent Board has ever urged in avoidance of such jury findings is that

such issues were not properly triable under the preponderance of the evidence rule or by a jury.

In Corpus Juris Secundum, Volume 73, Page 599, Section 227, the rule laid down as follows:

> "The Court is not bound or concluded by the administrative body's findings or recitals as to jurisdictional facts; it has the power and duty of examining and weighing all the evidence concerning such facts and making therefrom its own independent findings in accordance with its own view of the PREPONDERANCE OF THE EVIDENCE."

Justice Smedley, formerly of the Supreme Court of the State of Texas, recognized the distinction between an attack upon a denial of due process exercised and an attack upon the merit of the order itself. In the case of HAWKINS v. TEXAS COMPANY, 209 SW 2d 338, and in Paragraph 11 of the Opinion, Justice Smedley says:

> "In this case there is no attack on the commission's order as having been made without a hearing or for lack of proper procedure. The suit was filed to test the validity of the order in its factual basis . . ."

Unquestionably, there is a distinction in law as to the proper method utilized by Courts in determining the two questions.

The question of procedural due process is traditionally a judicial question as distinguished from a test of the factual basis of an administrative order. Consequently, such judicial function is properly triable under the preponderance of the evidence rule.

Respondent Board admits on Page 21 of its Reply to Petitioner's Application for Writ of Error as follows:

> "Respondent agrees with the Petitioner that if Petitioner was not given notice of the hearing before Respondent, and if Petitioner was not given notice of the nature of the charges a-

gainst him, and if Petitioner was not given a full and open hearing, then the order of Respondent revoking the license of Petitioner was arbitrary, unreasonable and capricious and an abuse of its discretion."

Petitioner would insist that under such admission, taken in connection with the immutable findings of fact by the jury, that denial of due process of law by Respondent Board is conclusively established. However, Petitioner will hereafter set forth for the consideration of the Court the underlying authorities and applicable rationale.

In the instant case three witnesses testified concerning facts relative to the conducting of the alleged hearing. Two of said witnesses were the attorneys for Petitioner. Both witnesses testified that they were required to leave the hearing, that the members of Respondent Board advised them that they considered a transcrippt of testimony which was not made available to either Petitioner or his attorneys, that an examination of Respondent Board's records were made and no order charging Petitioner could be found, and that Respondent Board refused to provide Petitioner's attorneys with a record of the proceeding or a transcript of the secret evidence and testimony. Said witnesses further testified that Respondent Board refused to continue the purported hearing to give Petitioner and/or his attorneys an opportunity to deny, refute or explain such secret evidence and testimony.

The other witness was the attorney for Respondent Board who testified that he was familiar with the records of the Board concerning the instant case and had in fact prepared the Order of revocation and other orders therein. Said witness testified that he did not know of the existence of an order charging Petitioner. Said witness further testified that the statute, Article 3271a, Sec. 22, R.C.S. of Texas, under which Re-

spondent Board attempted to act, required Respondent Board to make first a determination that there should be a hearing and, thereafter set out or reduce their charges into a written order and serve said order upon the accused as a prerequisite to a hearing to revoke an engineering license. This particular testimony is found on Page 22 of the Statement of Facts of the Trial Court. Said witness, even though present during the purported hearing, failed to deny that Respondent Board considered secret evidence and testimony; that Petitioner's attorneys were required to leave said hearing; that Petitioner's attorneys were not furnished, at their request, with a copy of the secret evidence and testimony and a record of the proceeding; and that Respondent Board refused to delay the purported hearing to give said attorneys an opportunity to deny, refute and explain said secret evidence and testimony. Furthermore, there was no other testimony denying or rebutting the testimony of Petitioner's attorneys. The above summary of testimony is contained in the Statement of Facts and is the testimony which the Supreme Court of the State of Texas has said in its Per Curiam Opinion does not raise the issue of a denial of due process of law.

The determination which is now before this Court is whether the above quoted findings of fact by the jury constitute a denial of due process of law as admitted by Respondent Board in the quotation from their reply to Petitioner's Writ of Error heretofore set out.

In American Jurisprudence, Second Series, Volume 2, at Page 168, under the topic of ADMINISTRATIVE LAW, Section 354, the following general rule is stated:

> "The general principles that all powers of an Administrative agency must be exercised in accordance with the statute or other law conferring such power, and that an agency's jur-

isdiction or authority to act depends upon compliance with the statute vesting power in the agency, apply in relation to procedural provisions laid down in the statutes governing the agency, at least such as are deemed mandatory and involve matters of substance and not mere technicalities. An attempt to exercise a power without compliance with the provisions as to the manner and circumstances of its exercise is a nullity."

Where the administrative proceeding is penal in nature and specifically in regard to suspension or revocation of a license, the procedure prescribed by statute must be strictly pursued; 2 Am Jur 2d 168; NEW JERSEY STATE BOARD of OPTOMETRISTS v. NEMITZ, 21 NJ Super 18, 90 A2d 740; ST. LOUIS & S.F.R. CO. v. STATE, 26 Okla 62, 107 P 929; STATE ex rel. SBORDY v. ROWLETT, 138 Fla 330, 190 So 59, 123 ALR 769; NEW JERSEY STATE BOARD of OPTOMETRISTS vs. NEMITZ, supra.

The foregoing rule has been adopted as the law of the State of Texas and is succinctly expressed in the opinion of the Court in the case of STATE BOARD of MEDICAL EXAMINERS vs. McCLELLAN, 307 SW 2d 317, ref. n. r. e.

Article 3271a, Section 22(b), R. C. S. of Texas, provides in part as follows:

"In determining any such charges the Board shall proceed upon sworn information furnished it by any reliable resident of this State; such information shall be in writing and shall be duly verified by the person familiar with the facts therein charged, and three (3) copies of the same shall be filed with the Secretary of the Board. Upon receipt of such information the Board, if it deems the information sufficient to support further action on its part, SHALL MAKE AN ORDER SETTING THE CHARGES

THEREIN CONTAINED FOR THE HEARING AT A SPECIFIED TIME AND PLACE, AND THE SECRETARY OF THE BOARD SHALL CAUSE A COPY OF THE BOARD'S ORDER AND OF THE INFORMATION TO BE SERVED UPON THE ACCUSED AT LEAST THIRTY (30) DAYS before the date appointed in the order for the hearing." (emphasis added) .....

In the Case at Bar the uncontradicted evidence shows that sworn information of alleged misconduct by Petitioner was furnished to the Board; however, the evidence further shows, and the jury determined, that NO ORDER WAS EVER MADE BY RESPONDENT BOARD SETTING FORTH THE MISCONDUCT WITH WHICH PETITIONER WAS CHARGED AND FOR WHICH RESPONDENT BOARD ATTEMPTED TO REVOKE HIS LICENSE.

Petitioner was not afforded due process by Respondent Board in its attempted exercise of its authority, and the order resulting therefrom is void, if Respondent Board was without jurisdiction to act. Respondent Board could acquire jurisdiction only if it made a finding that further action should be taken as a result of the filing with it of complaints by reliable residents of the State of Texas, SECURITIES STATE BANK OF SAN JUAN v. STATE, 169 SW 2d 554, ref., w. o. m. Under the provisions of Article 327la, Section 22(b), R. C. S. of Texas such finding is accomplished by the making of an order setting the charges therein contained for hearing at a specified time and place. Under the statute, jurisdiction is not invoked until and unless the Board makes such an order setting the charges and specifying the time and place for hearing.

In the face of the indisputable fact that the Respondent Board did not make and enter an order evidencing its finding that further action on its part should be taken, and specifying the charges and a

time and place for hearing thereon, shows conclusively that Respondent Board acted without jurisdiction and its order is void for want of due process.

In addition to the necessity that Respondent Board make its order to invoke its jurisdiction, such an order was a mandatory requirement to properly charge Petitioner with the alleged misconduct and to accomplish statutory "notice" to him of the charges against which he would have to defend.

In GARNER v. TEXAS BOARD OF PHARMACY, 304 SW 2d 530, writ ref., the Court held that, even though the evidence might show a licensee to be guilty of misconduct, the order revoking his license would be void unless the written charge against him specified the misconduct in particularity. It is obvious that if an order is void when the written charge, made and entered, fails to adequately set out the violation, then certainly an order would be void in the complete absence of a written charge.

In TAMEZ v. STATE BOARD OF DENTAL EXAMINERS, 154 SW 2d 976, no writ hist., the statute required that the licensee be charged by the making of an order the same as required by Article 3271a, Section 22(b), supra, in the instant case. In the TAMEZ CASE, an order was actually made, but such order did not specify the violation in particularity. The Court, in setting aside the revocaton of licensee's right to practice Dentistry because the order attempting to charge such licensee with a violation was insufficient, stated as follows;

> "We know, as the Legislature knew, the Board of Dental Examiners is composed of dentists and not of lawyers. They are not familiar with legal forms and are not to be held to legal exactness, but the requirements of the statute are few and simple, and we think the substance of it must be met."

The Court of Civil Appeals and the Supreme Court

of the State of Texas in the case at Bar, ignored the uncontradicted fact that Petitioner was not charged by order as required by Article 3271a, Sec. 22(b), R.C. S. of Texas, and the only justification offered for such flagrant disregard of the jury finding was that this case is one to be determined under the "substantial evidence" rule. It is respectfully directed to this Honorable Court's attention that both the GARNER CASE, supra, and the TAMEZ CASE, supra, were recognized by the Courts deciding them to be cases governed by the "substantial evidence" rule. Notwithstanding such fact, both orders of revocation in the respective cases were set aside because the licensee was not charged in particularity.

Petitioner was further denied due process of law because he was not served with an order of the Board setting out the charges against him and the time and place of a hearing thereon.

It has been universally held by the Courts of the State of Texas that where a statute requirs notice and hearing, such prerequisite is jurisdictional, and its ommission render the ensuing order of an administrative agency void. STATE v. BLUE DIAMOND OIL CORPORATION, Tex. Civ. App., 76 SW 2d 991; GREER v. RAILROAD COMMISSION, Tex. Civ. App., 117 SW 2d 142, writ dism., RAILROAD COMMISSION vs. RED ARROW FREIGHT LINES, Tex. Civ. App., 167 SW 2d 249, writ ref. w. o. m.; KERRVILLE BUS CO. v. CONTINENTAL BUS SYSTEM, 208 SW 2d 586; FRANCISCO v. BOARD OF DENTAL EXAMINERS, 149 SW 2d 619; TEXAS DEPARTMENT OF PUBLIC SAFETY v. HAMILTON, 306 SW 2d 763; GARNER v. TEXAS BOARD OF PHARMACY, 304 SW 2d 530, writ ref.; BOARD OF DENTAL EXAMINERS v. FIELDSMITH, 242 SW 2d 213, writ ref. n. r. e.; and TAMEZ v. STATE BOARD OF DENTAL EXAMINERS, 154 SW 976, no writ hist.

In FRANCISCO v. BOARD OF DENTAL EXAM-

INERS, 149 SW 2d 619, wherein an adminstrative order revoking and cancelling a professional license was set aside for lack of "notice" and "hearing", the Court Stated:

> "On the other hand, the practice of dentistry is a lawful profession, and has the same status as any other lawful profession or occupation, in the respect that the right or privilege to engage in it, once it is lawfully acquired, is a right or privilege protected by the due process clauses of the state and federal constitutions. Vernon's Ann. St. Const. art. 1, Section 19; U.S.C.A. Const. amend. 14 SHERMAN v. STATE BOARD OF DENTAL EXAMINERS, Tex. Civ. App., 116 SW 2d 843, error refused."
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> "As was said in WALLER v. STATE, Tex. Civ. App., 68 SW 2d 601, 605, error refused: 'The right to practice a profession has been called a property right, but it is more. To obtain a license and proficiency requires the expenditure of money and years of preparation, attended by toil and self denial. Such right is the capital stock of its posessor fro mwhich dividends are expected sufficient to protect him from the infirmity of old age, and to provide his family with the comforts of life. There is moreover a prestige and good name and should be a pride attached to the practic of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and to leave him in most instances the equivalent of a bankrupt. But it does much more than this; it takes from him his professional standing and in a manner whatever good name he has, which leaves him poor indeed."
>
> "It is generally conceded that due process includes reasonable notice and the right to be heard. 9 Tex. Jr. p. 574. And this is true whether the tribunal exercising jurisdiction over rights

or privileges protected by the due process clauses, be a judicial, legislative, executive, or adminstrative one. 'The requirements of due process of law extend to every case of the exercise of governmental power.' 12 AM. Jr. p. 283, Section 586."

"The following from 12 Am. Jr. p. 307, paragraph 612: 'The rule that a hearing before judgment or order is not necessary to due process is especially applicable to proceedings before commissioners and boards, such as public utility commissioners, banking superintendents, etc. There is no violation of due process if provision is made for a trial de novo before a court of the issues passed upon by such a commission, for a judicial review of the order, even a review by mandamus, provision for suspending or setting aside the order, for a hearing before the order is put into effect, or for a rehearing upon application."

"However, even where judicial review of an administrative agency's order is accorded, if no stay of the effect of such order is provided, and if, meanwhile, irreparable injury would result, subjecting the party affected by the order to criminal prosecution for its violation, due process is not satisfied. PACIFIC T. & T. CO. v. KUYKENDALL, 265 US 196, 44 S. Ct. 553, 68 L. Ed. 975; PORTER v. INVESTORS SYNDICATE, 286 U.S. 461, 52 S. Ct. 617, 76 L. Ed. 1226."

In the GARNER CASE, supra, the FIELDSMITH CASE, supra, the TAMEZ CASE, supra, and in HIGHWAY TRANSPORTATION CO. v. SOUTHWESTERN GREYHOUND LINES, 124 SW 2d 433, writ ref., the Courts held that "notice" as contemplated by statutes, such as the one involved in the case at Bar, "includes

notice to the licensee not only that the cancellation of his license is to be considered but also that he should be informed of the charges against him" upon which the order of revocaton is based. Each of the foregoing courts held that an order of revocation of a license is void unless based upon specified charge contained in a notice in which the violation is set out with particularity.

Petitioner's right to notice is provided by statute and guaranteed by the "due process" provisions of the Constitutions of the State of Texas and of the United States of America.

Since it is patent from the record before this Court and from the jury's answer to Special Issue No. 2, which is now established as an immutable fact, that Respondent Board failed to give Petitioner "notice" as required by the statute and the Constitutions of the State of Texas and the United States of America, the order of Respondent Board is null and void. FRANCISCO v. STATE BOARD OF DENTAL EXAMINERS, supra.

Petitioner was further denied due process of law by Respondent Board in that Respondent Board made and entered its order revoking Petitioner's professional engineering license without affording him a full and open hearing. The jury in its answer to Special Issue No.3 so found. Said Special Issue No. 3 and the answer thereto were in no way objected to by Respondent Board. Rule 374 R.C.P. of Texas, provides that any ground of error not distinctly set forth in a Motion for New Trial is not properly before the Appellate Court. This rule applies in challenging the suffiency of evidence to support a jury finding. GIFFORD v. FORT WORTH & D.C. RY. CO., supra. Consequently, this case is before this Honorable Court with another immutable finding of fact, to the effect that the Order of Respondent Board was en-

tered without Petitioner being afforded a full and open hearing as required by his constitutional guarantee to due process of law.

The uncontradicted evidence shows that: Respondent Board refused Petitioner a complete transcript of the evidence adduced at the purported hearing as required by statute; Respondent Board considered secret evidence not adduced at the hearing; Respondent Board refused to make such secret evidence available to Petitioner might contradict, refute or explain same; certain members of the Board had predetermined Petitioner's guilt of the alleged charges prior to the purported hearing; Respondent Board refused to continue its purported hearing until Petitioner could properly defend himself at such hearing without working an undue hardship or an injustice upon himself; one member of the Board, Thomas C. Green, its Secretary and the person conducting the purported hearing, had a bias and prejudice against Petitioner; and during portions of said purported hearing the attorneys for Petitioner were excluded from attendance while Respondent Board considered and examined secret evidence which was not made available to Petitioner or his attorneys.

What constitutes a full and open hearing?

"A hearing must, however, be one which is a hearing in substance and not in form only." ASHBAKER RADIO CORP. v. FEDERAL COMMUNICATIONS COM., 326 US 327, 90 L ed 108, 66 S Ct 148; WASHINGTON ex rel. OREGON R. & NAV. CO. v. FAIRCHILD, 224 US 510, 56 L ed 863, 32 S Ct. 535; CHIN YOW v. UNITED STATES, 208 US 8, 58 L ed 369, 28 S Ct. 201; ENGLISH v. LONG BEACH, 35 Cal 2d 155, 217 P2d 22, 18 ALR 2d 547; BROWN v. HUMBLE OIL & REF. CO. 126 Tex 296, 83 SW 2d 935, 87 SW 2d 1069, 99 ALR 1107, 101 ALR 1393; and 2 Am Jur 2d 221.

The requirements of a full, fair and open hearing are clearly and precisely stated in several sections under the topic ADMINSTRATIVE LAW in American Jurisprudence, Second Series, Volume 2. Section 412 entitled "REQUIREMENT OF FAIR, OPEN AND IMPARTIAL HEARING", reads as follows:

> "When the Constitution or due process requires a hearing, it requires a fair one, whether or not a hearing is also required by statute. A hearing before an adminstrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open and impartial, and if such a hearing has been denied, the adminstrative action is void. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured as a minimal requirement by the Fourteenth and Fifth Amendments, as well as by the due process clause of state constitutions; there can be no compromise on the footing of convenience or expediency,or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.
>
> "Some statutes or regulations in terms require a fair hearing while other statutory hearing requirements , or provisions for a hearing in rules and regulations, are deemed to provide for a fair hearing such as is required by due process of law, even in situations where the due process clause may be deemed inapplicable. The Federal Adminstrative Procedure Act provides that the functions of all presiding officers and of officers participating in decisions in conformity with the act must be conducted in an impartial manner.
>
> "Trial by a biased judge or by a tribunal of

which the adversary of a litigant is a member does not afford due process of law, and generally an adjudicator who is not impartial may be declared disqualified to hold a hearing in a particular matter. However, due process is not necessarily denied by the fact that the hearing is before the same authority which has preferred the charges upon which the hearing is had, or by the fact that the trier of the fact has personal knowledge of the matter in issue or has expressed an opinion that the conduct in question is illegal. The combination in the same person of the functions of investigation or advocacy and the function of deciding is a recognized evil which, to some extent, the specific provisions of the Federal Administrative Procedure Act ameliorate, and even where such a statute does not apply, such a combination of functions has been held not to support a claim of denial of due process of law.

"THE REQUIREMENTS OF FAIRNESS ARE NOT EXHAUSTED IN THE TAKING OR CONSIDERATION OF EVIDENCE, BUT EXTEND TO THE CONCLUDING PARTS OF THE PROCEDURE AS WELL AS TO THE BEGINNING AND INTERMEDIATE STEPS. THE ELEMENTS OF FAIRNESS AND IMPARTIALITY MUST APPEAR IN THE CONDUCT OF THE HEARING ITSELF AND IN THE DELIBERATIONS AND DECISIONS WHICH FOLLOWS.

Section 413 entitled "PARTICULAR ELEMENTS OF FAIR HEARING" provides in part as follows:

"All elements required for a 'hearing' and probably all elements of procedural due process of law may be regarded as the elements of a fair hearing. The most important elements of a fair hearing are a hearing which is adequate in scope and extent before an impartial

tribunal. There are other requirements also, usually stated as requirements of due process rather than specifically as fair hearing requirements, such as orderly proceeding adapted to the nature of the case before a competent and legally constituted tribunal and in accordance with established rules.

Section 414 entitled "SCOPE AND EXTENT", provides in part as follows:

"What the Constitution or procedural due process requires in a proceeding before an administrative agency is reasonable notice and a reasonable opportunity to be heard and to present a claim or defense or to enforce or protect the rights involved, due regard being had to the circumstances of the particular case, the nature of the proceedings, and the character of the rights which may be affected by it.

"It is well settled that adminstrative agencies in holding hearings in the exercise of quasi-judicial functions are not held to strict conformity with judicial procedure required in a court of law and a hearing may be fair even though informal or summary. HOWEVER, A HEARING MERELY IN FORM, RATHER THAN SUBSTANCE, IS NOT SUFFICIENT, AND A ONE-SIDED INVESTIGATION OR A GENERAL DISCUSSION AND PRESENTATION OF VIEWS WWITHOUT ISSUES DRAWN DOES NOT CONSTITUTE A HEARING. In regard to quasi-judicial or adjudicatory proceedings it is often said that the Constitution guarantees the right to a full hearing and statutes frequently ex pressly provide for full hearing, apparently intending to provide for what the Constitution requires in such proceedings.

Section 415 entitled "AS DEPENDENT UPON FUNCTIONS AND STATUTES" provides in part as follows:

"The rule generally applicable to hearings

provided for by statute before administrative agencies, where no particular form of procedure is prescribed is that due process of law must be observed, and if the requirements of due process are met under the circumstances of the particular proceeding involved, the hearing is sufficient. The use of the word 'hearing' in a statute shows a manifest purpose of compliance with the requrements of due process of law; and if provision is made for notice and hearing without designating the procedural steps to be followed, the constitutional requirements will be implied, it being the duty of the court to construe a statute so as to make it harmonize with the Constitution if this can be done without doing violence to the terms of the statute and ordinary canons of constructions. Some statutes are held to contemplate a full hearing, and others expressly so provide.

"A requirement of a hearing in the exercise of quasi-judicial or adjudicatory power has obvious reference to the tradition of judicial proceedings with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. This is generally regarded as requiring a 'trial-type hearing' or 'formal hearing' in such proceedings, with evidence, witnesses and argument, consideration of the evidence and argument, and decision on the record. It is said that the guaranty of hearing implied in due process clause applies both to a hearing of issues of fact and a hearing on issues of law, but it appears that whether a trial-type hearing or something less is required might be determined not on the basis of the type of the proceedings as a whole but on the

basis of whether a particular issue involves the determination of 'adjudicative facts' on the one hand or "legislative facts' or nonfactual issues of law or policy on the other.

"A requirement of full hearing means one in which ample opportunity is afforded to all parties to make, gy evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the steps asked to be taken. Where a hearing is required on an auxiliary or advisory proceeding, and is not the determinative hearing, less than fullscale trial or hearing may suffice."

Under the foregoing authorities the hearing required by Article 3271a, Section 22(b), supra, is obviously one to determine or adjudicate facts and must be full and open. It is further contended that as a matter of law, the evidence in this case shows that Petitioner was denied a full and open hearing. Such contention notwithstanding, under the evidence adduced in the Trial Court the jury was certainly justified in finding that Petitioner was denied a full and open hearing by Respondent Board.

The remaining question to be considered by this Court is the constitutionality of Article 3271a, Section 22(b), R.C.S. of Texas. Respondent Board and its attorney, the Attorney General of the State of Texas, have pointed out and contended that the language contained in Article 3271a, Section 22(b), R.C.S. of Texas, provides for the application of the substantial evidence rule in the judicial review of adminstrative order rendered thereunder. There can be no question that the revocation of a Professional Engineering License under said statute is a "quasi-judicial" or

"judicial" act. BOARD OF DENTAL EXAMINERS v. FIELDSMITH, supra. These circumstances create a

situation where the Legislature has attempted to delegate to an administrative agency (Executive Department) a judicial function. The Supreme Court of the State of Texas, in KEY WESTERN LIFE INSURANCE COMPANY v. STATE BOARD OF INSURANCE, 350 SW 2d 839, recognized the vexing problem which has confronted the Courts of the State of Texas and other jurisdictions on appeals from orders by administrative agencies to the Courts.

In the KEY WESTERN LIFE INSURANCE CASE, it was held that the order of the administrative board involved the exercise of a "quasi-judicial" or "judicial" function and the statute providing for a trial de novo or a complete judicial review was proper. The Court further stated that if the determination by an administrative agency involved a legislative determination or executive ruling that a statute which provided for a trial de novo or a complete judicial review would be an improper deligation to the judiciary of a legislative or an executive function in violation of Article 2, Section 1, Texas Constitution. The Supreme Court of the State of Texas squarely met this problem, which has continuously confused many Courts, and recognized that if the order of an administrative agency from which an appeal is taken is one involving a legislative determination or executive ruling then the only power which could be delegated to a reviewing Court would be to decide if such determinaton was made upon substantial evidence. If the rationale of the Supreme Court of the State of Texas in the KEY WESTERN LIFE INSURANCE COMPANY CASE, supra, is to be followed as the law in the State of Texas, then it is conclusive that an attempt by the Legislature to authorize an administrative agency to make a "quasi-judicial" or "judicial" determination, such authorization is an improper delgation of the power of the

Judicial Department to an Administrative agency (Executive Department) unless a provision is made for complete judicial review in the nature of a trial de novo. Petitioner is in complete accord with the rationale of the KEY WESTERN LIFE INSURANCE COMPANY CASE, supra, and is of the opinion that the process of judicial clarification of the law governing judicial review of administrative orders in the State of Texas is long overdue.

Since the question in the case at Bar is obviously a "quasi-judicial" or "judicial" question and Article 3271a, Section 22(b), R.C.S. of Texas, does not provide for a complete judicial review or a trial de novo, then such statute is violative of Article 2, Section 1, Texas Constitution and the order of Respondent Board based upon such unconstitutional statute is null and void.

Petitioner further urges to this Honorable Court that Article 3271a, Section 22(b), R.C.S. of Texas, in addition to being unconstitutional for the reason immediately aforesaid, is also unconstitutional on its face because it does not provide for a stay of the effect of an order rendered thereunder during the time that an appeal is being made thereto when such statute does not provide for a "complete judicial review" by trial de novo.

The FRANCISCO CASE, supra, holds that the right to practice a lawful profession, once acquired, is a right or privilege protected by the due process clauses of the State and Federal Constitutions and discussed the power of an administrative board to revoke a professional license in the following language:

> "The following from 12 Am Jur. p. 307, Section 612: 'The rule that a hearing before judgment or order is not necessary to due process is especially applicable to proceedings before commissioners and boards, such as public utility

commissioners, banking superintendents, etc. There is no violation of due process if provision is made for a trial de novo before a Court of the issues passed upon by such a commission, for a judicial review of the order, even a review by mandamus, provision for suspending or setting aside the order, for a hearing before the order is put into effect, or for a rehearing upon application.

"However, even where judicial review of an administrative agency's order is accorded, if no stay of the effect of such order is provided, and if, meanwhile, irreparable injury would result, subjecting the party affected by the order to criminal prosecution for its violation, due proces is not satisfied. PACIFIC T. & T. CO. v. KUYKENDALL, 265 U.S. 19[6], 44 S Ct. 553, 68 L. Ed. 975; PORTER v. INVESTORS' SYNDICATE, 286 U.S. 461, 52 S. Ct. 617, 76 L. Ed. 1226.

The facts of the case at Bar clearly fall squarly within the purview of the foregoing language.

Article 3271a, Section 22(b), R.C.S. of Texas, does not provide that orders of revocation by Respondent Board are to be held in abeyance pending any appeal from such orders. Due process requires an affirmative assurance that a valuable property right will not be summarily taken and that persons will be protected in that property right until the judicial process has been given an opportunity to run its full measure. Where the statute (as in the case at Bar) does not provide for supersedeas of the effect of an order of an administrative board determining a "quasi-judicial" or "judicial" question, the constitutional guarantee of due process is not satisfied, and this is particularly true where a valuable property right, such as in this case, is involved.

The foregoing rule announced in the FRANCISCO CASE, supra, applies squarely to the statue here-

under consideration; consequently, Article 3271a, Section 22(b), R.C.S. of Texas, is unconstitutional.

There can be no doubt that administrative boards serve a useful and necessary purpose in the structure of government. If the burden of resolving the ever increasing volume of matters which must be settled in the interest of orderly society fell on the judiciary alone, the Courts would be clogged beyond hope of efficiency. To obviate such a problem, legislatures have increasingly turned to the expedient of delegating the determination of "quasi-judicial" and "judicial" questions to administrative boards. The results have been efficacious and a tremendous work load has been removed from the shoulders of the Courts.

However, in a sense, every act of an administrative body which would otherwise be exercised by a judicial tribunal is a usurpation of the judicial function. The process, however efficient, is still one which deals with the basic responsibilities of the judiciary, and the courts must stand as the guarantee that private rights are not sacrificed to bureaucratic expediency. Because judicial matters are being determined by non-judicial tribunals, the courts have uniformly demanded that both the statutory and constitutional guarantees, which accompany the delegation of their authority to administrative agencies, receive strict observance and receive complete judicial review on appeal. The judiciary is jealous of its role in government at least to the extent that it will not permit other tribunals to make a travesty of that system of law which the judiciary itself has so long protected and preserved.

If the Opinion of the Court of Civil Appeals at El Paso, and the failure of the Supreme Court of the State of Texas to grant a Writ of Error and reverse said opinion, are permitted to become the law of the land, administrative agencies will be empowered to issue indiscriminately orders which, if viewed in

hindsight appear to be supported by substantial evidence, will absolutely binding on whoever it aggrieves without regard to the manner which the administrative agency reached its decision or the motivation which precipitated such orders. If and when such a philosophy prevails, the guarantee of due process will become a hollow shell and will be replaced by the theory of "the end justifies the means".

Petitioner insists that Respondent Board should be compelled to abide by the sanctions of, and act in accordance with, the provisions of the very statute from which it draws its life. That statute in the case at Bar provides and guarantees to Petitioner (1) the making of an order specifying charges and a time and place for hearing; (2) notice of hearing accomplished by delivery of the foregoing order; and (3) a full and open hearing. This Honorable Court is now confronted with what must be accepted on this appeal as immutable facts, to-wit: (1) Respondent Board made no order specifying charges and a time and place for hearing; (2) statutory notice was not given to Petitioner; and (3) Petitioner was not afforded a full and open hearing. A more flagrant disregard and contempt by Respondent Board for the statute under which it was created would be difficult to imagine, and if the action of such Board is permitted to stand in this case, the procedural requirements under that statute, and all similar statutes, will be rendered meaningless.

Petitioner did not question the sufficiency of the evidence under the substantial evidence rule or the preponderance of the evidence rule. The complaint which Petitioner made at the Trial Court; made in the Court of Civil Appeals; made in the Supreme Court of the State of Texas and now makes in this Court, is that he was deprived of his license to practice Professional Engineering by an order entered by Respondent Board in violation of the statute under

which Respondent Board attempted to act and without complying with procedural due process of law as guaranteed Petitioner under the Constitutions of the State of Texas and of the United States of America. The Trial Court submitted this case to the jury on such a theory and based its judgment upon jury findings Respondent Board) which show that Respondent Board did not comply with the procedures prescribed by Article 3271a, Section 22(b), R.C.S. of Texas, and Petitioner was not afforded due process of law.

Petitioner further urges to this Honorable Court that by reasons heretofore stated, Article 3271a, Section 22(b), R.C.S. of Texas, is unconstitutional and that the order of Respondent Board based thereon is void for that reason.

WHEREFORE, Petitioner respectfully requests that a Writ of Certiorari issue to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, Texas.

Respectfully submitted

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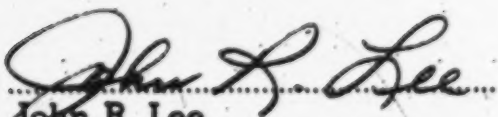
By 
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ATTORNEYS FOR PETITIONER

The above and foregoing Petition for Writ of Certiorari is being mailed this 5th day of May, 1965 to Waggoner Carr, Attorney General of Texas, Capitol Station, Austin 11, Texas, and Pat Bailey, Assistant Attorney General of Texas, Capitol Station, Austin 11, Texas, Attorneys for Respondent.

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JOHN R. LEE
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Kermit, Texas

By John R. Lee
John R. Lee
ATTORNEYS FOR PETITIONER

APPENDIX

January 13, 1965

IN THE SUPREME COURT OF TEXAS

No. A-10,383

Homer Trimble

vs.

Texas State Board of Registration
For Professional Engineers

From Winkler County,
Eighth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgement of the Court of Civil Appeals, it is ordered that said application be, and hereby is refused.

It is further ordered that applicant, Homer Trimble, pay all costs incurred on this application.

February 17, 1965

No. A-10,383

Homer Trimble

vs.

Texas State Board of Registration
For Professional Engineers

From Winkler County,
Eighth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled, in accordance with the Per Curiam opinion herein this day delivered.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas, in the case numbered and styled as above, as same appears of record in the minutes of said Court under the dates shown.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 3rd day of March, 1965.

GEO. H. TEMPLIN, Clerk

By /s/ Garson R. Jackson, Deputy

No. A-10,383

IN THE SUPMEME COURT OF TEXAS

Homer Trimble

vs.

For Professional Engineers

Certified copy of Order of the Supreme Court of Texas. (Application for Writ of Error REFUSED-N. R. E.)

IN THE SUPREME COURT OF TEXAS

No. A-10,383

Homer Trimble,
Petitioner

v.

Texas State Board of Registration for Professional Engineers,
Respondent

From Winkler County, Eighth District

PER CURIAM: ON REHEARING

The Court of Civil Appeals did not discuss petitioner's complaint that he had not been afforded procedural due process of law in the proceeding leading to the revocation of his license.

We have carefully read the Statement of Facts, and have concluded that the evidence does not raise the issue. The testimony of petitioner and of his counsel is that petitioner did receive a letter from the secretary of respondent Board, advising petitioner of the charges against him and setting a date for a hearing on these charges. Petitioner testified that attached to this letter were copies of the affidavits of the two witnesses on which the charges were based.

The evidence further shows that petitioner and his attorney appeared before respondent Board on the date set for a hearing and served the members and officers of the Board with an injunction restraining them from proceeding with the hearing.

Some thirty to forty-five days later, and after the injunction had been dissolved, a new date for hearing was set, and petitioner and his attorney appeared before the respondent Board at that hearing and introduced such witnesses and evidence as they desired.

Therefore, this record shows conclusively that

petitioner was afforded due process in all orders and steps taken by the Board and the trial court. Northwestern Bell Telephone Co. v. Nebraska State Railway Commission, 297 U. S. 464, 56 S. C. 519, 80 L. Ed. 804.

Motion for rehearing is overruled.
Opinion delivered
February 17, 1965

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing page contains a true and correct copy of per curiam opinion of the Supreme Court of Texas on motion for rehearing of application for writ of error in the case of HOMER TRIMBLE v. TEXAS STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS, No. A-10383, from Winkler County, Eighth District, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and Seal of the Supreme Court of Texas, at the City of Austin, on this 3rd day of March, 1965.

GEO. H. TEMPLIN, Clerk

By /s/ Garson R. Jackson, Deputy

No. A-10,383

Homer Trimble

vs.

Texas State Board of Registration
For Professional Engineers

CERTIFIED COPY OF JUDGEMENT
AND OPINION OF THE SUPREME COURT
OF TEXAS ON APPLICATION FOR
WRIT OF ERROR
(REFUSED - - N. R. E.)

FILED IN
COURT OF CIVIL APPEALS
Mrach 3, 1965

E. J. Redding
Clerk 8th District

(SEAL)

COURT OF CIVIL APPEALS

EL PASO

Texas State Board of Registration for Professional Engineers,
Apellant,
vs.
Homer Trimble,
Appellee.

No. 5674
Appeal from the District Court of Winkler County,

OPINION

Texas State Board of Professional Engineers revoked the license of Homer Trimble to practice engineering in the State of Texas, and he appealed to the district court which, after trial by jury, entered judgement nullifying the Board's action. From such judgement the Board brings this appeal based on allegations of four points of error.

The appellant's first point of error is that the district court erred in submitting the case to a jury and by trying the case under the preponderance of the evidence rule. We sustain this point of error, for on an appeal from a ruling of an administrative agency, such as this one, it is the established law that the sole question is one of law for the court's determination. The substantial evidence rule governs the trial of a suit of this nature. Evidence is heard anew and the reasonableness of the agency's action is independently adjudged by the court on the basis of evidence admitted in the judicial proceeding. Southern Canal Co. v. State Board of Water Eng., 318 S.W. 2d 619 (S. Ct., 1958). The question of whether the action of the agency is supported by substantial evidence must be determined by the court from a consideration of the entire record in the case, as that record has been

made in the trial court. The test is not whether the evidence admitted in court preponderates against the administrative decision, nor yet whether there is merely some evidence to support the decision. The test is whether the administrative decision finds reasonable support in substantial evidence.

> Board of Firemen's Relief and Retirement F. Tr. v. Marks 242 S.W.2d 181 (S.Ct., 1951); Texas Co. v. Texas Employment Commission, 261 S.W.2d 178 (Ref., N.R.E.).

> "The party aggrieved by the administrative decision is not entitled to a trial de novo in court but must assume the burden of satisfying the courts that the administrative decision is illegal, arbitrary, or capricious; that is, that it is not reasonably supported by substantial evidence." (Board of Firemen's Relief and Retirement F. Tr. v. Marks, supra).

See also Texas State Board of Medical Examiners v. Scott, 377 S.W.2d 104 (Aus. Civ. App., Feb. 1964), where the cause was reversed and remanded for new trial because the trial court had submitted it to a jury under the preponderance of the evidence rule.

The action to revoke appellee's engineering license was brought by appellant on allegations that appellee attempted to bribe the mayor and an alderman of the city of Kermit to obtain contracts with that city. Affidavits of the mayor and alderman were before the Board in its hearing, and on the trial before the court appellant called both the mayor and alderman as witnesses and offered their testimony as to the facts of the bribe alleged. The court refused this testimony on the grounds that these witnesses had not appeared and testified in person before the Board at its hearing; that the question before the court was the reasonableness of the action of the Board based on the evidence before such Board; and the now oral testimony of the two witnesses would be immaterial

and irrelevent to the question before the court.

From what has been said above, that the court must make its determination from the evidence before it, it follows that the proffered evidence of the two witnesses should have been admitted, unless otherwise objectionable. In protecting the rights of the parties the court does not act on the basis of the record before the agency, but on the record made in the the court. On another trial of this cause the testimony of the mayor and alderman should be admitted, unless subject to valid abjection for other cause.

We do not find it necessary to pass on appellant's other points of error, and in view of the fact that the case was tried before a jury when it should have been before the court, and the fact that the court was under the wrong impression as to the rule of evidence, this court is of the opinion that the case should be remanded for a new trial.

The judgement of the trial court is reversed and the cause remanded.

/s/ Stephen F. Preslar

Stephen F. Preslar, Associate Justice

CLERK'S OFFICE
COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL
DISTRICT OF TEXAS

March 11, 1965
El Paso, Texas

I, E. J. Redding, Clerk of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, at El Paso, do hereby certify that the preceding 3 pages contain a true and correct copy of the opinion of the Court of Civil Appeals, delivered by Honorable Stephen F. Preslar, A.J., on the 10th day of June, A. D. 1964, in cause No. 5674, Texas State Board of Registration for Professional Engineers, Appellant v. Homer Trimble, Appellee, now on file in my office at El Paso.

IN TESTIMONY WHEREOF, I have hereunto set my hand with the seal of said court, the same day and date above written.

E. J. Redding, Clerk
By /s/ H. L. Potter, Deputy

(SEAL)

July 29, 1964

COURT OF CIVIL APPEALS
EL PASO

No. 5674.

Texas State Board of Registration
For Professional Engineers, Appellant,
vs.
Homer Trimble, Appellee

From Winkler County,
Eighth District

This day came on to be heard appellee's motion for a rehearing, and the Court having considered the same, is of the opinion that the same should be overruled.

Wherefore, it is considered, adjudged and ordered that appellee's said motion be, and the same is hereby, overruled.

March 3, 1965

COURT OF CIVIL APPEALS

EL PASO

No. 5674

Texas State Board of Registration
For Professional Engineers, Appellant,

vs.

Homer Trimble, Appellee

From Winkler County,

Eighth District

This day came on to be heard appellee's second motion for a rehearing, and the Court having considered the same, is of the opinion that the same should be overruled.

Wherefore, it is considered, adjudged and ordered that appellee's said motion be, and the same is hereby, overruled.

I, E. J. Redding, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of the State of Texas, in the case numbered and styled as above, as same appears of record in the minutes of said Court under the dates shown.

Witness my hand and the seal of said Court, at the City of El Paso, this the 11th day of March, A. D. 1965.

E. J. REDDING, Clerk

By /s/ H. L. Potter, Deputy

In The Complaint
v.
Homer Trimble
Registered Professional
Engineer
License Serial No. 1446
604 West Avenue
Austin 1, Texas

BEFORE THE TEXAS STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS IN SESSION AT AUSTIN, TEXAS

ORDER OF THE BOARD

On this, the 7th day of November, 1961 came on to be heard before the Texas State Board of Registration for Professional Engineers duly in session a certain complaint filed with the Board under date of 29 of May, 1961, in which it was complained that Homer Trimble (Registered Professional Engineer, Serial No. 1446) has violated the provisions of Section 22 (s) of Article 3271A, Vernon's Annotated Texas Statutes, being the Act for Registered Professional Engineers, (Senate Bill No. 74, Acts Regular Session, 45th Legislature), in that Homer Trimble has been guilty of misconduct in the practice of Engineering as a Registered Professional Engineer. Homer Trimble having been duly notified and having appeared through his attorneys Mr. John R. Lee and Mr. Bob Ziesenheim. The charges were that Mr. Homer Trimble on April 10, 1961, did attempt to bribe Mr. Bert L. Stevens Mayor of the City of Kermit, Texas, and Mr. Joe Marlett City Councilman of the City of Kermit, Texas, to award certain Engineering contracts to said Homer Trimble. These charges were proven to the satisfaction of the Board. The Board by unanimous opinion voted that the charges contained in the complaint are true, and

It is accordingly ORDERED, ADJUDGED AND DECREED that the license to practice Professional Engineering within the State of Texas before held by Homer Trimble - Serial No. 1446 is revoked and cancelled.

Rendered and entered this 7th day of November 1961.

/s/ Robert E. Moore
Chairman
/s/ H. O. Hodson
/s/ U. W. Stephens
/s/ Thomas C. Green
Secretary
/s/ J. W. Beretta
/s/ Douglas Ragland